No. 16,465

United States Court of Appeals

For the Ninth Circuit

UNION PAVING COMPANY, a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

APPELLANT'S OPENING BRIEF.

EVERETT S. LAYMAN,
KENNETH S. CAREY,
220 Bush Street, San Francisco 4, California,
Attorneys for Appellant.

EVERETT S. LAYMAN, JR.,
ARTHUR J. LEMPERT,
220 Bush Street, San Francisco 4, California,
Of Counsel.

Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Texts

No. 16,465

United States Court of Appeals
For the Ninth Circuit

UNION PAVING COMPANY, a corporation,
Appellant,

vs.

DOWNER CORPORATION, and RAY H. DOWNER,
Appellees.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

Appellant (hereinafter usually referred to as "Union Paving") is a Nevada corporation authorized to do business in the State of California. Its principal place of business is in the City and County of San Francisco. (Tr. pp. 3-4.) Appellees (hereinafter usually referred to as "Downer"), are a California corporation, whose principal place of business is in the City of Stockton, County of San Joaquin, and Ray H. Downer, a resident of Stockton, California. (Tr. p. 3.) The amount in controversy is in excess of $3,000.00.

On October 23, 1958, the Honorable Sherrill Halbert, United States District Judge, made and filed the Order of the Court directing entry of Final Judgment of Dismissal as to appellant's sixth counter-claim. Said Order

was made pursuant to Rule 54 (b) Federal Rules of Civil Procedure. (Tr. p. 35.)

Within the time prescribed by the Rules and the Order of this Court, appellants took the necessary steps to perfect its appeal.

Jurisdiction is vested in this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE.

On or about March 11, 1948, the parties hereto entered into a joint venture agreement whereby Downer was to construct, and Union Paving was to finance the construction of, a sanitary sewage system for the Mount Vernon Sanitary District, Bakersfield, California. (Tr. pp. 5-12.) During the progress of this construction, it became apparent that certain sludge pumps necessary to the installation of the treatment plant would not be delivered as ordered. The district engineer gave the joint venturers permission to use used sludge pumps to test the disposal plant. (Tr. pp. 19-20.) The joint venturers were advised that a sewage disposal system was available from the War Assets Administration. (Tr. p. 20.) On or about February 28, 1949, R. H. Downer and Norman Hawkins met with Joseph A. Dowling, president of Union Paving Company, in San Francisco. The surplus sewage system located at Gardner Field, Kern County, California, was discussed. (Tr. p. 21.) Mr. Hawkins stated that he knew that such system could be acquired at a minimum price of $4,000. It was agreed that the joint venture would seek to acquire the entire sewage system, and use what could be used in the Mount Vernon system and sell the re-

mainder. It was agreed that Mr. Downer was to make the bid to the War Assets Administration in his own name. On February 29, 1948, appellant issued its check as follows:

1. No. 26901, Norman L. Hawkins, $500.00. This was in the nature of a finder's fee.

2. No. 26902, War Assets Administration, $4,000.00. This was certified and was the price bid for the sewage system.

3. No. 26903, War Assets Administration, $300.00. This was certified and was for faithful performance of the purchase agreement.

On July 27, 1949, Union Paving Co. was reimbursed for these advances by the joint venture when it issued its check No. 630, payable to Union Paving Co. for $4,800.00. (Tr. p. 21.)

Mr. Downer's bid was successful. The used sludge pump was installed in the Mount Vernon sewage disposal plant for testing purposes and was subsequently replaced when the new pumps were delivered. The joint venturers are presently engaged in extensive litigation concerning this joint venture. On or about December 9, 1953, appellee commenced an action in the United States District Court for the Northern District of California, Northern Division, Numbered 6960. (Tr. pp. 3-12.) In that complaint it was alleged that there had been an account stated winding up the affairs of said joint venture. An additional account alleged a breach of contract on the part of appellant. Appellant answered said complaint with numerous defenses and several counter-claims. The one in issue herein is the so-called Sixth Counter-Claim

whereby appellant seeks damages for an alleged conversion of the assets of the Gardner Field sewage system. (Tr. p. 16.) The District Judge determined that said counter-claim was neither a compulsory counter-claim nor a permissive counter-claim under Rule 13, Federal Rules of Civil Procedure, and ordered said counter-claim dismissed. On October 23, 1958, the District Court directed that final judgment of dismissal be entered regarding said Sixth Counter-Claim on the ground that said matter was not a justiciable issue in said action. The Court determined that there is no just reason for delay and ordered that the judgment of dismissal be a final adjudication of said Sixth Counter-Claim. (Tr. pp. 35-6.)

STATEMENT OF QUESTION PRESENTED.

Reduced to its lowest terms, the question presented to this Court is:

> May a defendant file and maintain a Counter-Claim arising out of the transaction which is the subject matter of the complaint, notwithstanding there is another action pending asserting the same cause of action.

In support of the affirmative of this issue, appellant relies upon the following authorities:

1. Rule 13(a) and (b) Federal Rules of Civil Procedure:

> "(a) COMPULSORY COUNTERCLAIMS
>
> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of

the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) PERMISSIVE COUNTERCLAIMS

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

The error complained of is the Judgment of Dismissal found at page 35 of the transcript.

SUMMARY OF ARGUMENT.

Appellant asserts that the answer in the case at bar is unequivocally in the affirmative. Appellant contends:

The District Court erred in that:

1) It refused to hear a Counter-Claim in which it had jurisdiction of the subject matter and of all necessary parties.

2) The transaction involved was an essential portion of the accounting before the Court.

3) There was no other tribunal in which the cause was liable at the time the Order of Dismissal was made.

4) The Counter-Claim in question was either a Compulsory or a Permissive Counter-Claim as those terms are used by the Federal Rules.

From the ensuing argument, it will become apparent to the Court that there is no case on all fours. The cases cited by the learned District Judge do not stand for the proposition for which cited and as will hereinafter be shown are readily distinguishable from the case at bar.

ARGUMENT.

THE DISTRICT COURT ERRED IN REFUSING TO HEAR A COUNTER-CLAIM IN WHICH IT HAD JURISDICTION OF THE SUBJECT MATTER AND OF ALL NECESSARY PARTIES.

a. The District Court had jurisdiction of the subject matter.

Appellant stated a cause of action for conversion of property owned and purchased by the joint venture. The allegations of the Answer (Tr. p. 14) and the Sixth Counter-Claim (Tr. p. 16) are that Downer wrongfully sold and converted a substantial portion of said Gardner Field sewage system. The District Judge, in his Memorandum, concedes that the subject matter of the claim arose out of the transaction which was the subject matter of appellees' claim. Thus, the Court had jurisdiction over the subject matter. This has never been disputed by appellees nor by the holding of the District Judge.

b. All indispensable parties were before the Court.

The gravamen of the cause of action set forth in appellant's Sixth Counter-Claim sounds in tort. Appellant asserts that appellees converted the Gardner Field equipment. That others may also be involved is immaterial since it is clear that an injured party may sue any one or

all joint tort-feasors and that the ones not sued are not indispensable parties.

Pische Mines, etc. v. Fidelity-Philadelphia Trust Co., 206 F. 2d 336 (C.A. 9, 1953), cert. denied;
Ward v. Deavers, 203 F. 2d 72 (App. D.C., 1953);
Ackerly v. Commercial Credit Co., 111 F. Supp. 29 (D.C., S.D. N.Y., 1954).

Conceding for the purpose of argument only that White, the other alleged tort-feasor, is a necessary party, Rule 19(b) Federal Rules of Civil Procedure provides: "The Court in its discretion may proceed in the action without making such persons parties . . . if, though they are subject to the jurisdiction of the Court, their joinder would deprive the Court of jurisdiction of the parties before it."

If we assume that White was a necessary party, in *Sechrist v. Palshook,* 95 F. Supp. 746, the Court was faced with the same problem as was the District Court in this case. One of the defendants, joint tort-feasors, was a citizen of the same state as plaintiff. A motion to dismiss the action was denied. The Court simply dismissed the action as to the resident defendant.

See also

Decorative Cabinet Corp. v. Star-Aid of Ohio, Inc., 10 F.R.D. 266 (S.D., N.Y., 1950);
Rumig v. Ripley Mfg. Co., 86 F. Supp. 506 (E.D., Pa., 1949); and
Cohn v. Columbia Pictures Corp., 9 F.R.D. 204 (S.D., N.Y., 1949).

All to the same effect. In *Smith v. Sperling* (C.A. 9, 1956) 237 F. 2d 317, *cert. granted,* 77 S. Ct. 98 as to the

other issue presented, the District Court had dismissed plaintiff's second cause of action on the ground of "lack of equity". The reasoning behind the District Court's action apparently was that if United States Pictures, Inc. were joined by way of counter-claim jurisdiction would be destroyed and that United States Pictures was an indispensable party. In reversing the District Court on this issue, this Court said: "We hold the trial court should have determined the legal sufficiency of the 'second cause of action' against the Warners before proceeding to a determination of the status of the parties and the necessity of joining United States Pictures, Inc., and thus destroying jurisdiction."

THE COURT SHOULD HAVE PROCEEDED TO ADJUDICATE THE ISSUE AS TO THE PARTIES BEFORE THE COURT.

No legal reason has been advanced to justify the District Court's refusal to hear the matters presented. The Court conceded that it had jurisdiction of the subject matter. The judgment below was not based upon lack of indispensable parties or a holding that joining White would deprive the Court of jurisdiction. The Counter-claim was asserted timely and needed no permission to be filed. (Rule 13 a. and b.; cf Rule 13 e.)

The only reason advanced by the Court was that there was another action pending involving the same subject matter and same parties. Thus, the Court reasoned, "the Court cannot consider the Sixth Counter-claim a compulsory Counter-claim under Rule 13 a." (Citing cases.) (Tr. p. 30.) The matter in the opinion of the District

Judge could not be a permissive Counter-claim because "there is a definite logical relationship between the Mount Vernon Project (subject matter of plaintiff's Complaint) and the Gardner Field matter." (Tr. p. 30.)

The cases relied upon by the District Judge do not support the Judgment of Dismissal. In *Meyercheck v. Givens* (CA 7 1950) 186 F. 2d 85, the Court was presented with an appeal from a judgment entered pursuant to the Mandate of the Court of Appeals in a prior appeal. Appellant made numerous attacks on the judgment. One of the attacks made was that upon remand "The Court erred in refusing to allow the defendant to file a Counter-claim under Rule 13 a. against . . . one of the plaintiffs . . ." (p. 87.) The Answer of the Court of Appeals to this Argument demonstrates the inapplicability of the ruling to the case at bar.

The opinion states:

> "*No pleading in the form of a Counter-claim is shown in the record and it appears none was presented.* All that is shown is a colloquy between Court and Counsel by which the latter expressed the desire to file a counter-claim. *Thus, in the absence of a pleading disclosing the nature of the proposed counter-claim, there is nothing for us to review. More than that, the only matter before the Court was compliance with the mandate and we doubt if defendant was entitled to file a Counter-claim at that stage of the proceeding.* Rule 13 (a) on Compulsory Counter-claim provides 'that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action', and the record discloses that at the time the filing of a counter-claim was proposed, the defendant had pend-

ing in the Municipal Court of Chicago an action for the same grievance." (p. 87.)

Note the reasons given for sustaining the District Court's action are two: (1) No pleading to review and (2) the stage of the proceeding. The *last* sentence quoted does not hold as the learned District Judge asserted, that a pending action removes a claim that is otherwise a compulsory counter-claim for that classification.

The holding simply was that at that stage of the proceeding *no* counter-claim could be asserted.

In *Esquire Inc. v. Varga Enterprises* (C.A. 7. 1950), 185 F. 2d 14, the subject of the counter-claim in question had not matured into a right of action when the pleading was filed. The issue presented was whether the dismissal with prejudice of a counter-claim pleaded at that time was *res judicata* as to a right of action for unfair competition and trade-mark infringement. After stating that the dismissal was *res judicata* not only as to those matters actually pleaded but all which under Rule 13(a) were required to be pleaded the Court stated that the right of action referred to was not barred because (1) the right of action had not matured; hence could not be pleaded as a compulsory counter-claim and (2) although a compulsory counter-claim it was one which expressly need *not* be pleaded because there was another action pending.

Such a holding is a far cry from that apparently asserted by the Court below. There is *no* intimation at all that the fact that there was another action pending prevented the claim from being a compulsory counter-claim. The only holding is that failure to plead the claim will

not make any judgment entered *res judicata.* Rule 13 (a) makes this clear when it states that such a counter-claim "need not be so stated".

As stated above there are no cases on all fours. However, an analysis of Rule 13 and its background will demonstrate that this rule was designed to liberalize counter-claim practice and to prevent multiplicity of actions. The exception stated in Rule 13 (a) is in favor of the pleader —he should be permitted to file the counter-claim or refrain from doing so as he chooses. In 3 Moore's Federal Practice, Paragraph 13.14, Page 38, the author states:

> "A claim which is the subject of a pending action need not be pleaded although it does arise out of the transaction or occurrence that is the subject matter of the opposing party's claim. Thus assume P and A are in an auto wreck and both seriously injured and that A sues P for personal injuries in a state court. Then subsequently P sues A for personal injuries in a federal court. Although A's claim for personal injuries arises out of the transaction or occurrence which is the subject matter of P's claim in the federal court, A need not plead such claim, because his claim is the subject of an action already pending in another court. The next question is: May he do so? *The policy underlying Rule 13 would permit him, if he so desired, since the exception runs in A's favor and hence he should have the option to avail himself of it or not.*" (Emphasis added.)

In a parallel case (though not involving a counter-claim) *Ermentrout v. Commonwealth Oil Co.* (C.A. 5, 1955), 220 F. 2d 527, a majority stockholder had commenced a class action in the State Court in Florida. The instant action was commenced by a minority stockholder and was based

upon diversity of citizenship. The District Court had dismissed the action solely because of the pendency of the State Court proceeding. In reversing this judgment, the Court of Appeals said,

> "The rule is well established that when an action is in personam and involves a question of personal liability only, another action for the same cause in another jurisdiction is not precluded. Kline v. Burke Construction Company, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077; McClellan v. Carland, 217 U.S. 268, 30 S.Ct. 501, 54 L.Ed. 762; Byrd-Frost, Inc., v. Elder, 5 Cir., 93 F.2d 30, 115 A.L.R. 342. *Therefore the pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction.* McClellan v. Carland, supra; Kline v. Burke Construction Company, supra; Byrd-Frost, Inc. v. Elder, supra; Aetna Life Insurance Company of Hartford v. Martin, 8 Cir., 108 F.2d 824. 'Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principle of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case.' Kline v. Burke Construction Company, supra [260 U.S. 226, 43 S.Ct. 81]." (P. 530) (Emphasis added.)

We believe in this case the error of the District Court is made the more manifest because the subject matter of the

counter-claim was inextricably enmeshed with the subejct matter of the accounting before the Court. To this issue we now turn.

THE SO-CALLED GARDNER FIELD MATTER WAS AN ESSENTIAL PORTION OF THE ACCOUNTING BEFORE THE COURT.

The principal matter determined by the Preliminary trial before the District Court was that there had been *no* accounting between the parties as to the Mount Vernon Joint Venture. Thus, the Court, pursuant to the pleadings was required to make such an accounting. The Order provided that the Court would "in due course appoint a special master to render an accounting between the parties to this action." (Tr. p. 33.)

On June 9, 1958, Union Paving after due notice moved the District Court to either require the Special Master to include the Gardner Field matter in the accounting or in the alternative to direct issuance of a final appealable judgment thereon. (Tr. p. 34.) The Court's response was the Order directing entry of final judgment filed October 23, 1958. (Tr. pp. 35-6.)

The District Court prior to making the Order of October 23, 1958 had the following facts to demonstrate that the Gardner Field matter was an essential portion of the accounting ordered by that Court:

1) The reason for entering the Gardner Field transaction was to procure a sludge pump to test the Mount Vernon plant. (Tr. pp. 19-20.)

2) The money used was joint venture money, i.e., Union Paving in its role as financier advanced its

own funds which were in turn reimbursed by joint venture funds. (Tr. p. 21.)

3) According to Downer, the $2,000.00 obtained from White was used to pay a joint venture payroll. (Tr. p. 22.) This was reflected on the joint venture books until altered allegedly at Joseph A. Dowling's request.

4) J. T. Masters who had a contract with Downer to construct the Treatment Plant (Tr. p. 24) also was to dismantle the Gardner Field Plant and remove the property to Bakersfield (Tr. pp. 24-5.)

Indeed, in its Order the District Court stated that in its opinion "the 'Gardner Field' matter would, . . . arise out of the same transaction or occurrence which forms the subject matter of the main action . . ." (Tr. p. 30.) It is Hornbook law that all matters arising out of the same transaction should be settled in the same action if possible. It is difficult to see how the Special Master could take an accounting between the parties without inquiring into something that was an essential part of the joint venture. This, however, the Court ordered him to do. In this the Court erred.

THERE WAS NO OTHER TRIBUNAL IN WHICH THE CAUSE WAS TRIABLE AT THE TIME THE DISTRICT COURT DISMISSED APPELLANTS' SIXTH COUNTER-CLAIM.

Appellant in this case had put all of his eggs in one basket. Notwithstanding that the Gardner Field matter had been pleaded in the State Court proceeding, appellant had by its action elected to try this matter together

with the Mount Vernon matter in the Federal Courts. Therefore, no action had been taken in the State Court to bring that matter to trial.

More than five (5) years had elapsed from the filing of the Cross-Complaint in the State Court at the time of the hearing before the District Court. This fact was called to the attention of the District Judge and is commented on. (Tr. p. 31.)

The fact of the matter is, as the learned District Judge was aware, Downer had an absolute right to dismiss the State Court proceeding pursuant to Section 583 of the California Code of Civil Procedure. Thus, as a practical matter there was *no* other tribunal in which this matter could have been tried.

THE SIXTH COUNTER-CLAIM WAS EITHER A COMPULSORY OR A PERMISSIVE COUNTER-CLAIM. IN EITHER EVENT IT HAVING BEEN TIMELY ASSERTED, IT WAS AN ERROR TO DISMISS THE CLAIM.

The District Court held that Union Paving's Sixth Counter-claim was neither compulsory nor permissive. Hence, reasoned the District Court it was improperly asserted as a Counter-claim. Such holding, however, completely ignores the language and the history of Rule 13, and is at complete variance with both.

Rule 13 provides in part,

"(a) COMPULSORY COUNTERCLAIMS

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject mat-

ter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that such a claim need not be so stated if at the time the action was commenced the claim was the subject of another pending action.

"(b) PERMISSIVE COUNTERCLAIMS

A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim."

A counter-claim is, of course, a claim asserted against an opposing party as distinguished from a co-party. There can be no doubt but what appellant's Sixth Counter-claim is a counter-claim as so defined.

Note that Rule 13 divides counter-claims into only two classifications, i.e. Compulsory and Permissive. Since there are only two classes, a counter-claim must be one or the other.

It is appellant's contention that the Sixth Counter-claim is a compulsory counter-claim. The factual predicate for so holding was found by the District Court. (Tr. p. 30.) Further, the discussion at pp. 13-14 supra of this brief demonstrates that the Gardner Field transaction arose from the transaction that is the subject matter of Downer's claim.

In *United Artists Corp. v. Masterpiece Productions* (C.A. 2, 1955), 221 F. 2d 213, plaintiff sued for copyright infringement and unfair trade practices. Defendant's counter-claim brought in third parties. Defendant's claim had been held permissive by the District Court and the

counter-claim dismissed because jurisdiction was thus destroyed. *Held:* Compulsory.

> "A counter-claim is compulsory under F.R. 13 (a) 'if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim.' *In practice this criterion has been broadly interpreted to require not an absolute identity of factual background for the two claims, but only a logical relationship between them* . . . (citation)." " 'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." (p. 216.) (Emphasis added.)

Nothing in F.R. 13 (a) compels a different result. True, that rule excludes from its definition of counter-claim those which require for their adjudication "the presence of parties of whom the Court cannot acquire jurisdiction." This restriction should be limited to cases of inability to obtain personal jurisdiction over the additional parties. (p. 217.)

See also the same case in the Court below where the District Judge said,

> "The crucial test of compulsoriness is that of logical relationship between the claims, tempered by the eye to flexibility, by a realization that the law's logic is but an inchoate empiricism, and by the desire to avoid multiplicity of suits." (15 F.R.D. 395.)

Rule 13 (a) states two criteria for a compulsory counter-claim (1) it must arise out of the transaction or occurrence which is the subject matter of the opposing party's claim *and* (2) it does not require the presence of

third parties of whom the Court cannot acquire jurisdiction. The exception that such a claim need not be pleaded if it is the subject of another action pending is no part of the definition. This language simply gives the pleader the option to file or not to file as the case may be. Since the option belongs to the pleader he can avail himself of it or not as he chooses. It cannot be the law that such a counter-claim can be dismissed simply because of another action pending. Indeed, it is a matter of discretion, as to whether the Federal Court should even stay its proceedings pending determination of the other action. *(Stevenson v. Erie R. Co.* (S.D. N.Y. 1948) 80 F.S. 393.)

In the *Stevenson* case, *supra,* the defendant had made a motion for judgment of dismissal on the ground of another action pending. This motion was denied but the Court, in exercise of its discretion, stayed its proceedings pending determination of the other case.

Even if this be held a permissive counter-claim under 13 (b), there was no basis upon which to base the judgment of dismissal. The Court had jurisdiction of all necessary parties and of the subject matter of the action.

In *American Car & Foundry Inv. Corp. v. Chandler-Graves Co.* (E.D. Mich. S.D. 1941) 2 F.R.D. 85, plaintiff sued to quiet title to certain letters patent and for incidental injunctive relief. Defendants counter-claimed for treble damages under the Clayton Act and brought in additional parties. The latter appeared specially and moved to quash return of service. Plaintiff moved to dismiss the counter-claim. Jurisdiction was based upon diversity of citizenship. In refusing to quash or to dismiss the District Judge stated the purpose of Rule 13 as follows:

"This rule was enacted for the purpose of dispensing with needless independent actions when existing causes of action might be brought as permissive Counter-claim and particularly for counter-claims such as the one here involved, jurisdiction of the subject matter of which is clearly vested in the United States Courts." (p. 87.) (Emphasis added.)

Historically, Rule 13 is an outgrowth of Equity Rule 30. It was designed to liberalize and broaden counter-claim practice in that it did away with the waiver of a jury trial which resulted from the filing of a legal counter-claim in an equitable action, it made possible the filing of counter-claims in actions at law and permitted any pleader to file a counter-claim as a part of his first responsive pleading. In short, it removed all restrictions upon the filing and maintenance of counter-claims.

"Under Equity Rule 30, there was a holding that the court, could in its discretion, deny leave to file a permissive counter-claim. This power is expressly provided for, but also clearly limited by present Rule 13 to two situations: (1) Where the pleader's counter-claim matures or was acquired after serving his pleading, and (2) where the pleader has failed to set up a counter-claim through inadvertence or excusable neglect and wishes to set up the counter-claim by amendment. *Except in these two cases, leave of Court is not the prerequisite to the pleading of a permissive counter-claim, although the Court may order separate trials . . .*" (3 Moore's Federal Practice p. 3 Rule 13.) (Emphasis added.)

Finally as is stated in Moore's Federal Practice.

"Subdivision (a), which is compulsory, compels a party to plead any claim with certain exceptions, which he has against an opposing party, 'if it arises

out of the transaction or occurrence that is the subject matter of the opposing party's claim'. Subdivision (b), which is permissive, complements Subdivision (a) and allows such a party to present any action claim or claims that he may have against the opposing party or parties. *Thus, all restrictions upon the right to plead counter-claims have been removed.*" (Emphasis added.)

CONCLUSION.

Union Paving invoked the jurisdiction of the District Court in a matter in which the Court had jurisdiction of the subject matter and of all indispensable and necessary parties. The District Court abdicated that jurisdiction without legal reason. This was error. As this Court stated in *Romero v. Wheatley* (C.A. 9, 1955), 226 F. 2d 399, at 401:

> "When a Federal Court is properly appealed to in a case over which it has by law jurisdiction. . . . The right of a party . . . to choose a Federal Court, where there is a choice, cannot be properly denied."

Wherefore, appellant respectfully submits that the judgment of the District Court be reversed and that Court be directed to hear appellant's Sixth Counter-claim.

Dated, San Francisco, California,
August 5, 1959.

Respectfully submitted,
EVERETT S. LAYMAN,
KENNETH S. CAREY,
Attorneys for Appellant.

EVERETT S. LAYMAN, JR.,
ARTHUR J. LEMPERT,
Of Counsel.